

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Joint Application of AT&T Communications of California, Inc. (U 5002 C) and WorldCom, Inc. for the Commission to Reexamine the Recurring Costs and Prices of Unbundled Switching in Its First Annual Review of Unbundled Network Element Costs Pursuant to Ordering Paragraph 11 of D.99-11-050.

Application 01-02-024
(Filed February 21, 2001)

Application of AT&T Communications of California, Inc. (U 5002 C) and WorldCom, Inc. for the Commission to Reexamine the Recurring Costs and Prices of Unbundled Loops in Its First Annual Review of Unbundled Network Element Costs Pursuant to Ordering Paragraph 11 of D.99-11-050.

Application 01-02-035
(Filed February 28, 2001)

Application of The Telephone Connection Local Services, LLC (U 5522 C) for the Commission to Reexamine the Recurring Costs and Prices of the DS-3 Entrance Facility Without Equipment in Its Second Annual Review of Unbundled Network Element Costs Pursuant to Ordering Paragraph 11 of D.99-11-050.

Application 02-02-031
(Filed February 28, 2002)

Application of AT&T Communications of California, Inc. (U 5002 C) and WorldCom, Inc. for the Commission to Reexamine the Recurring Costs and Prices of Unbundled Interoffice Transmission Facilities and Signaling Networks and Call-Related Databases in Its Second Annual Review of Unbundled Network Element Costs Pursuant to Ordering Paragraph 11 of D.99-11-050.

Application 02-02-032
(Filed February 28, 2002)

Application of Pacific Bell Telephone Company (U 1001 C) for the Commission to Reexamine the Costs and Prices of the Expanded Interconnection Service Cross-Connect Network Element in the Second Annual Review of Unbundled Network Element Costs Pursuant to Ordering Paragraph 11 of D.99-11-050.

Application 02-02-034
(Filed February 28, 2002)

Application of XO California, Inc. (U 5553 C) for the Commission to Reexamine the Recurring Costs of DS1 and DS3 Unbundled Network Element Loops in Its Second Annual Review of Unbundled Network Element Costs Pursuant to Ordering Paragraph 11 of D.99-11-050.

Application 02-03-002
(Filed March 1, 2002)

ADMINISTRATIVE LAW JUDGE'S RULING ON OUTSTANDING MOTIONS AND ERRATA

This ruling addresses several outstanding motions filed by AT&T Communications of California, Inc. (AT&T) and WorldCom, Inc. (WorldCom) (collectively, "Joint Applicants"), Pacific Bell Telephone Company d/b/a SBC California (SBC), and other parties to the above-captioned consolidated proceedings. In addition, this ruling lists the various errata that have been

served in this proceeding, some of which have not been formally filed with the Commission. Parties are directed to formally file a copy of these errata with the Commission's Docket Office.

Motion for Interim DS-1 Loop Price

On June 4, 2003, XO California, Inc. (XO) filed a motion requesting a Commission order setting an interim monthly recurring DS-1 loop price for SBC, subject to true-up following the adoption of final DS-1 loop prices in this proceeding.¹ XO asks that the Commission apply the same 15.1% discount to the current DS-1 loop price as the Commission applied in Decision 02-05-042 to SBC's basic 2-wire loop. XO contends that the factors justifying the 15.1% discount for basic loops apply equally to DS-1 loops and that there is ample reason to believe forward-looking costs for DS-1 loops will be well below the price resulting from an interim 15.1% discount. XO states that interim relief is warranted because of delays to the original schedule, which initially called for a decision in this proceeding within the first half of 2003.

SBC opposes XO's motion for several reasons. First, SBC maintains that DS-1 loop prices are already subject to true-up through XO's interconnection agreement and the Federal Communications Commission's (FCC's) decision approving SBC's application to provide in-region long distance phone service. Second, SBC contends there are architectural and costing differences between basic and DS-1 loops that require an evidentiary investigation. SBC notes that the Commission granted interim relief for some unbundled network elements

¹ On July 16, 2003, XO filed a motion to correct its June 4 motion with a corrected set of geographically deaveraged interim DS-1 loop rates.

(UNEs) in D.0-2-05-042 only after giving SBC an opportunity to be heard, and the same due process is required to consider XO's current request. Third, SBC argues that the correct approach is to reach a decision on permanent UNE prices for DS-1 loops and the other UNEs in the scope of this case as quickly as possible, rather than take the time to examine DS-1 issues further.

In response, XO does not deny that its interconnection agreement with SBC contains a true-up with regard to DS-1 loop rates. Nevertheless, XO contends that SBC's true-up obligation does not mitigate the anti-competitive harm to XO from what it considers inflated DS-1 loop rates in the interim.

I agree with SBC that XO's motion would require an additional round of comments and opportunity for SBC to be heard on whether the same facts supporting interim basic loop rates apply to DS-1 loops. Essentially, it is not reasonable to take time away from the efforts to issue a decision in the permanent phase of this case to consider additional interim relief. Additionally, XO appears to already have the benefit of some degree of true-up for DS-1 loop rates through its interconnection agreement with SBC. For these reasons, XO's motion is denied.

Motion for Reconsideration

On May 21, 2003, I issued a ruling granting in part Joint Applicants' motion to strike portions of the October 18, 2002 declaration of SBC's witness, Dr. Debra J. Aron.² The ruling found that portions of Dr. Aron's declaration contain an analysis of SBC's costs and revenues that is not based on the total

² Application 01-02-024, *Administrative Law Judges' Ruling on Joint Applicants' and SBC Pacific's Motions to Strike*, May 21, 2003 ("May 21 Ruling.")

element long run incremental cost (TELRIC) methodology that the FCC requires states to use in setting UNE rates and is, therefore, outside the scope of this proceeding.

On June 23, 2003, SBC filed a motion requesting reconsideration of the May 21 Ruling. SBC asks for reconsideration on the grounds that the ruling fails to consider the Commission's standards for the admissibility of evidence. SBC maintains the Commission should consider Dr. Aron's analysis as relevant and probative evidence in deciding TELRIC-based UNE costs. SBC contends that Dr. Aron's analysis, which compares SBC's current costs to its interim UNE rates, is relevant because it shows a large discrepancy between SBC's actual costs and its current UNE prices. SBC states that Aron's analysis "indicates that TELRIC has been misapplied with respect to SBC California's existing UNE prices." (SBC Motion, 6/23/03, p. 13.) Therefore, SBC contends that Dr. Aron's declaration serves as a benchmark or validity check when setting UNE prices and thereby tends to prove or disprove a material fact.

In addition, SBC contends the May 21 Ruling ignores precedent recognizing the validity and usefulness of analyses like Dr. Aron's that compare an incumbent local exchange carrier's actual costs to the forward-looking UNE rates proposed in a given proceeding. According to SBC, UNE cost proceedings often compare actual costs to TELRIC proposals and the FCC and other state commissions have recognized the importance of having actual cost data available in evaluating proposed TELRIC UNE rates.

Joint Applicants, The Utility Reform Network (TURN), Covad Communications Company and XO (collectively "Joint Respondants") oppose SBC's motion for reconsideration. They state that SBC's motion merely reargues its earlier opposition to the motion to strike the Aron declaration and presents no

new or different facts, circumstances or law in support of reconsideration. The Joint Respondants disagree with SBC that the Aron analysis is relevant and probative of TELRIC-based UNE costs. Further, they disagree that there is precedent for relying on analyses such as Aron's. Although FCC staff has noted the value of comparing model results to historical ARMIS³ data, it also noted that differences do not prove TELRIC has been misapplied.

I deny SBC's motion for reconsideration because the stricken portions of Aron's declaration do not contain relevant and probative evidence and precedent does not require the Commission to retain *all* analyses involving actual or historical costs. First, the ruling properly excluded the Aron analysis because Aron does not establish that actual costs are a reasonable projection of forward-looking ones. She concludes that current UNE prices are inadequate solely because they differ from 2001 actual costs, without ever establishing a link between actual costs and forward-looking costs. Dr. Aron acknowledges there is no link between actual costs and TELRIC by stating, "There is no a priori reason that forward-looking costs necessarily must be lower (or higher) than the costs that are computed from the actual data that the company submits to the FCC as ARMIS data." (Aron Declaration, 10/18/02, p. 11.) Based on this statement alone, actual costs have no tendency to prove or disprove the level of forward-looking TELRIC costs. Thus, Aron's analysis is not relevant. Moreover, if the Aron analysis were not stricken, the Commission would have to evaluate its accuracy through extensive analysis of "actual costs" and whether they are

³ ARMIS is a data collection and information system maintained by the FCC, containing data that incumbent local exchange carriers provide to the FCC.

indicative of forward-looking costs. Such an endeavor with an actual cost analysis of dubious relevance would be a waste of resources.

Second, contrary to SBC's contention, the Commission is not required to admit *all* information related to actual costs. The current record of this proceeding contains numerous references to SBC's actual costs. The May 21 Ruling did not intend to, and certainly did not, strike all references to actual cost data from this proceeding. Indeed, the May 21 Ruling agreed with SBC that "the level of [SBC's] actual costs may be reasonable to consider within the context of setting UNE rates." (May 21 Ruling, p. 6.) The ruling, however, disagreed that "*any* analysis involving actual costs is necessarily relevant to this proceeding." (*Id.*)

Essentially, portions of Aron's declaration were stricken not because they contained actual cost data, but because they contained an analysis performed at an aggregate level that made assumptions from total historical company costs to estimate the costs of providing UNEs, without establishing a reasonable link between historical and forward-looking costs. FCC rules prohibit using historical costs as the sole basis for estimating forward-looking UNEs,⁴ and these FCC rules were upheld by the U.S. Supreme Court in *Verizon Communications Inc. v. FCC* (122 S.Ct. 1646). The precedents cited by SBC do not support the contention that this Commission must consider any and all analysis involving actual costs. If this Commission is to have any reasonable possibility of setting UNE rates within a reasonable time frame, it must have the ability to exclude analyses that are not based on forward-looking methodologies.

⁴ See 47 C.F.R. 51.505(d).

Finally, SBC's motion for reconsideration does not present any new circumstances and generally reargues its earlier positions. SBC's motion for reconsideration is denied.

Motion for Official Notice

On August 22, 2003, Joint Applicants filed a motion requesting official notice of the Memorandum Opinion and Final Judgment issued by the U.S. District Court for the Eastern Division of the Northern District of Illinois in *Voices for Choices v. Illinois Bell Telephone Co. Inc.* (03 C 3290; N. Dist. Ill.). According to Joint Applicants, the Memorandum Opinion struck down legislation advocated by SBC in Illinois because it conflicts with federal law. Joint Applicants contend the court's decision is relevant because in this proceeding, SBC has proposed costing approaches substantively identical to those the Illinois District Court found violated federal law.

In response, SBC states it does not object to the Commission taking official notice of this court decision or any other relevant federal court case concerning TELRIC. However, SBC contends that Joint Applicants' motion is unnecessary, misrepresents the facts and law, and is a procedurally improper attempt to circumvent the normal briefing process and present additional argument. SBC asks that the motion be denied as moot.

SBC is correct that Joint Applicants' motion for official notice is unnecessary because the Commission could take official notice of the decision even in the absence of a request to do so. Furthermore, SBC is correct that the motion is essentially an unsolicited brief. Of course, the same could be said of SBC's response to the motion because it too presents argument on the meaning of the Illinois Court's decision. Given the enormity of the record in this case, it is

certainly not helpful for the parties to file unsolicited briefs or unnecessary motions. Therefore, Joint Applicants' motion is denied as moot.

Errata to Previous Filings

Parties have served or noticed the following errata to their various filings in this proceeding:

Joint Applicants

- 11/6/02 Notice of Errata to Opening Comments and Supporting Materials*
- 12/13/02 Second Notice of Errata to Opening Comments and Supporting Materials*
- 1/21/03 Third Notice of Errata to Opening Comments and Supporting Materials*
- 3/28/03 Notice of Errata to Rebuttal Comments*
- 4/11/03 Second Notice of Errata to Rebuttal Comments*
- 10/10/03 Notice of Errata to (A) Supplemental Brief and (B) Supplemental Reply Brief
- 10/20/03 Notice of Correction to Notice of Errata*

SBC

- 11/8/02 Errata to Opening Comments
- 2/10/03 Errata to Reply Comments
- 2/26/03 Second Errata to Reply Comments
- 5/1/03 Errata to Opening, Reply and Rebuttal Declarations

Z-Tel

- 2/18/03 Notice of Errata to Reply Comments

ORA/TURN

- 2/18/03 Errata to the Declaration of Trevor R. Roycroft, Ph. D.

The errata marked with an asterisk (*) were filed as a notice with the Commission. All other errata were served on the parties, but never filed. In order to ensure that the record of these proceedings is complete and includes all of the material listed above, I direct the parties to file a copy of the errata listed above, if not marked with an asterisk, with the Commission's Docket Office within 7 days of this ruling. If portions of these errata were filed as part of a motion for confidentiality, they do not need to be refiled, but any portions for which confidentiality is not sought should be filed. Parties should describe in the opening paragraph that their filing was directed by this ruling and contains a copy of an errata that was previously served but not filed. Parties have already served copies of these documents, so there is no need to serve them again on the service list. The re-filing of errata directed by this ruling will not trigger any new rounds of comments because parties were served these errata in time to comment on them in previous filings.

Motion to Amend Filing

On March 14, 2003, TURN filed a motion to amend its February 7, 2003 reply comments to include the workpapers associated with the declaration of its witness, Trevor R. Roycroft. There was no opposition to the motion. Good cause having been shown, TURN's motion to amend its filing is granted.

Motions for Confidentiality

The following motions to file information under seal are currently pending in this proceeding:

- August 5, 2002 – Joint Applicants' motion regarding attachments to ex parte communication of 5/10/02.
- August 16, 2002 – SBC's motion regarding proprietary attachments to notice of ex parte communication of August 13, 2002.

- August 28, 2002 – Joint Applicants’ motion regarding confidential material attached to response to 8/15/02 ALJ ruling.
- October 18, 2002 – Joint Applicants’ motion regarding unredacted proprietary versions of opening comments of 10/18/02.
- October 18, 2002 – SBC’s motion regarding proprietary attachments to opening comments of 10/18/02.
- October 18, 2002 – SBC’s motion for protective order for the input information used in the computer cost models.
- November 6, 2002 – Joint Applicants’ motion regarding proprietary versions of errata to opening comments.
- November 8, 2002 – SBC’s motion regarding proprietary errata material.
- January 21, 2003 – Joint Applicants’ motion regarding data incorporated in the HAI Model 5.3 third errata.
- February 7, 2003 – Z-Tel Communications, Inc.’s motion regarding confidential version of reply comments of 2/7/03.
- February 7, 2003 – Joint Applicants’ motion regarding unredacted version of reply comments of 2/7/03.
- February 7, 2003 – SBC’s motion regarding proprietary portions of reply comments of 2/7/03.
- February 7, 2003 – XO motion regarding nonredacted version of reply declaration of William Page Montgomery.
- February 7, 2003 – Communication Workers of America, District 9 (CWA) motion regarding proprietary labor cost data attached to reply comments.
- February 7, 2003 – TURN’s motion regarding confidential version of reply comments.
- March 12, 2003 – SBC’s motion regarding proprietary portions of rebuttal comments.
- March 12, 2003— Joint Applicants’ motion regarding proprietary version of rebuttal comments and supporting materials.
- March 12, 2003 – TURN’s motion regarding proprietary version of rebuttal declaration of Trevor R. Roycroft.

- March 12, 2003 – CWA’s motion regarding proprietary data attached to CWA’s rebuttal comments.
- March 14, 2003 – TURN’s motion to amend its February 7, 2003 motion to include materials appended to the confidential version of reply comments.
- March 21, 2003 – SBC’s motion regarding proprietary portions of supplemental compliance filing.
- March 28, 2003 – Joint Applicants’ motion regarding attachment B to errata to rebuttal comments.
- April 2, 2003 – SBC’s amended motion regarding portions of supplemental compliance filing, namely Attachment A, SBC’s recalculated UNE rates and supporting workpapers.
- April 11, 2003 – Joint Applicants’ motion regarding attachments B and D of 2nd notice of errata to rebuttal comments.
- April 15, 2003 – Joint Applicants’ motion regarding proprietary versions of motion to strike.
- May 1, 2003 – SBC’s motion regarding proprietary errata material.
- July 29, 2003 – XO’s motion regarding non-redacted copy of exhibit A to its ex parte communication of 7/24/03.
- August 1, 2003 – SBC’s motion regarding proprietary portions of post-hearing brief.
- August 1, 2003 – Joint Applicants’ motion regarding proprietary versions of opening brief and exhibits.
- August 22, 2003 – SBC’s motion regarding proprietary portions of post-hearing reply brief.
- August 22, 2003 – Joint Applicants’ motion regarding proprietary portions of post-hearing reply brief.
- September 25, 2003 – Joint Applicants’ motion regarding unredacted version of supplemental brief.
- September 26, 2003 -- AT&T’s motion regarding proprietary attachments to its ex parte communication of 9/24/03.
- October 2, 2003 – AT&T’s motion regarding proprietary attachments to its ex parte communication of 9/26/03.

- October 7, 2003 -- AT&T's motion regarding proprietary attachments to its ex parte communication of 10/2/03.
- November 3, 2003 – MCI (formerly WorldCom) motion regarding proprietary attachments to its ex parte communication of 10/30/03.
- November 7, 2003 – MCI (formerly WorldCom) motion regarding proprietary attachments to its ex parte communications of 10/21/03 and 10/24/03.

The information contained in these motions involves business-sensitive data of SBC, which, if revealed, could place SBC at an unfair business disadvantage. SBC has consistently designated company-specific network cost information as confidential and proprietary, and has made the information available to parties in this proceeding pursuant to non-disclosure agreements. As the local telecommunications market in California has become open to competition, the need for proprietary treatment of such confidential data has become increasingly important, because this information is highly relevant to competitive marketing and pricing strategies for these services. The Commission has granted similar requests for confidentiality in the past and will do so here.

Therefore, **IT IS RULED** that:

1. The June 4, 2003 motion by XO California, Inc. for interim DS-1 loop rates is denied.
2. SBC California's (SBC) June 23, 2003 motion for reconsideration is denied.
3. Joint Applicants' August 22, 2003 motion for official notice is denied as moot.
4. Joint Applicants, SBC, Z-Tel and The Utility Reform Network (TURN) are directed to file a copy of their errata listed in this motion with the Commission's Docket Office within 7 days of this ruling.

5. TURN's March 14, 2003 motion to amend its February 7, 2003 filing is granted.

6. The motions listed in this order to file information under seal are granted for two years from the date of this ruling. During that period, the information shall not be made accessible or disclosed to anyone other than the Commission staff except upon execution of an appropriate non-disclosure agreement with SBC, or on the further order or ruling of the Commission, the Assigned Commissioner, the Assigned Administrative Law Judge (ALJ), or the ALJ then designated as Law and Motion Judge.

7. If SBC believes that further protection of the information filed under seal is needed, it may file a motion stating the justification for further withholding of the information from public inspection, or for such other relief as the Commission rules may then provide. This motion shall be filed no later than one month before the expiration date of today's protective order.

Dated February 4, 2004, at San Francisco, California.

/s/ DOROTHY J. DUDA

Dorothy J. Duda
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Administrative Law Judge's Ruling on Outstanding Motions and Errata on all parties of record in this proceeding or their attorneys of record.

Dated February 4, 2004, at San Francisco, California.

/s/ ELIZABETH LEWIS

Elizabeth Lewis

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

The Commission's policy is to schedule hearings (meetings, workshops, etc.) in locations that are accessible to people with disabilities. To verify that a particular location is accessible, call: Calendar Clerk (415) 703-1203.

If specialized accommodations for the disabled are needed, e.g., sign language interpreters, those making the arrangements must call the Public Advisor at (415) 703-2074, TTY 1-866-836-7825 or (415) 703-5282 at least three working days in advance of the event.